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Supreme Court of the United States

October Term, 1952

No. 537
CIVIL

GENE DURFEE and LAURA DURFEE,

Petitioners,

vs.

JULIA E. DUKE,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

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Supreme Court of the United States

October Term, 1962

No. 593
CIVIL

GENE DURFEE and LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

Petitioners deem a short reply to respondent's brief opposing certiorari to be called for, primarily for the purpose of directing attention to respondent's erroneous construction of certain cases relied upon by the petitioners.

Respondent challenges petitioners' position that the Court of Appeals erred in holding that the full faith and credit clause does not preclude relitigation in a second forum of the question of the first court's jurisdiction of the subject matter even though subject matter jurisdiction

has been actually litigated in the first forum. However, the respondent's brief (with one exception) carefully avoids the true issue in discussing each of the cases relied upon by the petitioners in connection with both full faith and credit and res judicata, simply by "distinguishing" the cases on the ground that they involved a particular subject matter not involved herein. For example, *Davis v. Davis*, 1938, 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, is purportedly distinguished because it involved a divorce matter. Respondent would distinguish *Stoll v. Gottlieb*, 1938, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134, on the ground that it was a bankruptcy case. Again *Forsyth v. Hammond*, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665, is said to be inapplicable because it "did not deal with multi-state questions". The fact remains, however, that all of these cases support the rule precluding the relitigation of the question of subject matter jurisdiction which has actually been litigated in the first court and apply the full faith and credit protection with all its force to such instances.

The one case which respondent attempts to meet head-on and which (at page 3 of the brief opposing certiorari) respondent contends does not support petitioners' contention is *Adam v. Saenger*, 1938, 303 U. S. 59, 82 L. ed. 649, 58 S. Ct. 454. However, the holding of that case clearly supports the view that when a matter of fact or law on which jurisdiction depends was actually litigated in the original suit it may not be relitigated in a subsequent action.

Our position is that *Adam v. Saenger*, supra, and the other cases cited in the petition for writ of certiorari

herein hold that while a second court may in a broad sense "inquire" concerning the first court's subject matter jurisdiction (as too it may "inquire" concerning jurisdiction of the person)* on making such inquiry if it appears that subject matter jurisdiction has actually been litigated by the same parties and a determination has been made on that precise matter in the first case, that determination is res judicata and is entitled to full faith and credit in the courts of other states and in those of the United States. Petitioners again respectfully urge that the landmark case of *Forsyth v. Hammond*, supra, and *Stoll v. Gottlieb*, supra, *Adam v. Saenger*, supra, and many others support the rule of full faith and credit as well as res judicata and that the holdings of those cases preclude another inquiry into the jurisdiction of the subject matter on the part of the Nebraska Supreme Court in *Durfee v. Keiffer*, 1959, 168 Neb. 272, 95 N. W. 2d 618.

In view of the statement on page 10 of respondent's brief opposing certiorari to the effect that there will be no confusion if the opinion of the Court of Appeals for the Eighth Circuit is allowed to stand and respondent's contention that the opinion of the Court of Appeals would conclusively determine the issues, we shall discuss this matter in a little more detail than we did in the

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*For that matter a second court may always "inquire" into what was actually decided or could have been decided even on the merits. In the law of res judicata and full faith and credit the difference between jurisdictional matters (whether jurisdiction of the person or the subject matter is involved) and questions on the merits is that a decision on jurisdictional matters to be conclusive and entitled to full faith and credit must have actually been litigated.

petition for certiorari where we pointed out at pages 15 and 16 that if the Nebraska judgment based upon fully litigated factual determinations is not entitled to full faith and credit neither would a subsequent conflicting Missouri judgment be so entitled.

The Court of Appeals held that subject matter jurisdiction may be inquired into in a case such as this even though the question has been fully litigated. The court further held that the Nebraska Supreme Court judgment is not entitled to full faith and credit. In this circumstance, (1) either a subsequent judgment in the United States Court in Missouri holding that the Nebraska court did not have jurisdiction of the subject matter and that Missouri did have such jurisdiction would likewise be subject to a later attack on the ground of lack of subject matter jurisdiction or (2) the Court of Appeals is in error in holding that subject matter jurisdiction previously litigated in Nebraska may now be inquired into. So the respondent in arguing that the decision of the Court of Appeals herein would determine the issue and that no confusion would result necessarily admits that the Court of Appeals' decision is incorrect.

Neither Section 10(e) of the American Law Institute's Restatement of Judgments nor the cases of *Treinies v. Sunshine Mining Co.*, 1939, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44, and *United States v.* 171.74 *acres of land, etc.*, 1962, D. C. Neb., 206 F. Supp. 322, support a view that subject matter jurisdiction after having been litigated may be relitigated in another court one more time but not a third or fourth time. Rather they support the rule that subject matter jurisdiction having been fully litigat-

ed between the parties, may not be relitigated at all. The ultimate conclusion in Treinies that the Idaho court's determination on subject matter jurisdiction was res judicata was necessarily premised on the fact that the issue once determined could not be relitigated. The holding of the Court of Appeals in the present case is that it may be relitigated, and that decision is in conflict with *Treinies*.

Treinies v. Sunshine Mining Co., supra, was an interpleader action by Sunshine, a Washington corporation, against Treinies and other Washington citizens, claimants to Sunshine stock and accrued dividends and adverse claimants who were Idaho citizens. The interpleader action was brought because of the existence of inconsistent judgments concerning ownership of the Sunshine stock. The Superior Court of Spokane County, Washington, in administering an estate, adjudged that the stock was the property of the assignor of petitioner Evelyn H. Treinies and the District Court of Shoshone County, Idaho adjudged that the same property belonged to respondent Katherine Mason.

It appeared that in 1935 a Washington Superior Court in probate proceedings awarded the property to petitioner's assignor, after the Supreme Court of Washington had refused to grant a writ of prohibition against the exercise of jurisdiction by the superior court. Other proceedings were instituted by respondents in Idaho and in 1936, following an appeal by petitioner to the Supreme Court of Idaho, the District Court in Idaho held that the stock and dividends belonged to respondent Mason.

Later another Washington suit was brought challenging the validity of the Idaho judgment and seeking to quiet title to the stock. At this point the interpleader action was filed by Sunshine and further proceedings in the Washington suit to quiet title were enjoined.

It was held by this court that the Idaho judgment was res judicata even though the Idaho court may have *erroneously* failed to give full faith and credit to the Washington judgment. This court pointed out that if the Idaho court erred the right to review that error was by appeal in the Idaho proceedings and that no review was sought from the final decree of the Idaho District Court on the new findings of fact and conclusions of law on remittitur from the Supreme Court of Idaho.

The doctrine of full faith and credit and the doctrine of res judicata are expressly recognized in the Treinies case in this language, l. c. 308 U. S. 78, 84 L. ed. 93:

> "The Court of Appeals correctly determined that the issue of jurisdiction vel non of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.
>
> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

> "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties."

In the instant case petitioners are attacking the decision of the Court of Appeals directly not collaterally. We point these matters out to this extent at the present time because of the respondent's contention that while the Nebraska Supreme Court judgment is subject to attack in these Missouri proceedings, any judgment rendered in the Missouri case would not be subject to such an attack. The entire basis for that argument necessarily recognizes the validity of petitioners' argument that full faith and credit should be given to the Nebraska judgment and that likewise the doctrine of res judicata is applicable.

CONCLUSION

Petitioners assert that federal constitutional and statutory provisions require the Missouri courts including United States Courts sitting in Missouri to give full faith and credit to the judgment of the Nebraska Supreme court. To this respondent replies that the Missouri court cannot be required to give full faith and credit to a judgment of a court whose subject matter jurisdictional foundation is challenged. At this point, however, it must be emphasized that the very matter litigated in the Nebraska case between the petitioners and respondent, that is, the location of the disputed land, is the exact issue upon which the Nebraska court jurisdiction depended and that the Nebraska Supreme Court specifically found that it did have jurisdiction of the subject matter.

The prior cases of this court hold that subject matter jurisdiction once fully litigated between the parties may not again be litigated in subsequent proceedings. The Supreme Court of Nebraska decided that this land is located in the State of Nebraska and there is a factual foundation for that decision. Even if there were not and even if the decision were erroneous, the judgment is entitled to full faith and credit as between the petitioners and the respondent.

Respectfully submitted,

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PROOF OF SERVICE

I, Harold W. Kauffman, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 6, 1962, I served copies of the foregoing Reply to Respondent's Brief upon respondent by depositing the same in a United States mailbox with first class postage

prepaid, addressed to Robert A. Brown, Tootle-Enright Bank Building, St. Joseph 2, Missouri, such being the post office address of said counsel of record for respondent.

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